

2007

Khan v. State Record Committee : Reply Brief

Utah Court of Appeals

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Nasrulla Khan; Pro Se Appellant.

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IN THE UTAH COURT OF APPEALS

NASRULLA KHAN,
Plaintiff/Appellant,

:

vs.

:

APPELLANT'S REPLY BRIEF

THE STATE RECORDS COMMITTEE, :
UTAH DEPARTMENT OF PUBLIC :
SAFETY, :
MR. ROBERT L. FLOWERS, :
MS. JANELL B. TUTTLE, :
ET AL., :
Defendants/Appellees. :

Case No. 20070341

APPEAL

FROM THE THIRD DISTRICT COURT,
SALT LAKE COUNTY,
JUDGE ANTHONY B. QUINN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
DETAILS OF THE ARGUMENTS	1
I. Khan complied with Utah R. App. P. 24(k), and this court should not disregard his Brief	1
II. The district court incorrectly granted summary judgment to Appellees, because they did not comply with the GRAMA, and the applicable GRAMA statutes and Administrative Rules in responding to Khan's formal GRAMA request and formal GRAMA appeals, and with discovery	4
A. The district court incorrectly determined the Department complied with the GRAMA	5
B. The district court incorrectly determined the Records Committee complied with the GRAMA and the Administrative Rules	11
C. The district court's order did not comply with Utah R. Civ. P. 52(a)	15
III. Khan did not receive all of the records in Appellees' possession that pertain to his November 8, 2002 complaints, and that are responsive to his GRAMA request; thus, his appeal is not moot	17
CONCLUSION	25
ADDENDUM	27

D Utah Code §63-2-802.

Utah R. App. P. 24; Utah R. App. P. 27.

Utah R. Civ. P. 7; Utah R. Civ. P. 37.

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	5
--	---

<i>Bailey v. Bayles</i> , 2002 UT 58	16
<i>Crookston v. Fire Ins. Exch.</i> , 817 P.2d 789 (Utah 1991)	15
<i>Frisbee v. K & K Constr. Co.</i> , 676 P.2d 387 (Utah 1984)	5
<i>Granite Credit Union v. Remick</i> , 133 P.3d 440 (Utah App. 2006)	5
<i>Haines v. Kerner</i> , 404 U.S. 519, 520 (1972)	1, 2, 3, 22
<i>Oneida/SLIC, v. Oneida Cold Storage and Warehouse, Inc.</i> , 872 P.2d 1051 (Utah App. 1994)	3
<i>Poller v. Columbia Broadcasting System, Inc.</i> , 368 U.S. 464 (1962)	4
<i>State v. Brown</i> , 856 P.2d 358 (Utah App. 1993)	2
<i>Webster v. Sill</i> , 675 P.2d 1170 (Utah 1983)	5
<i>Weisberg v. U.S. Dep't. of Justice</i> , 543 F.2d 308 (C.A.D.C. 1976)	23
<i>Weisberg v. U.S. Dep't. of Justice</i> , 627 F.2d 365 (C.A.D.C. 1980)	18
Wright & Miller, Federal Practice & Procedure, Civil 3d §2575	15
Wright, Miller & Kane, Federal Practice & Procedure, Civil 3d §2727.....	5

RULES

Administrative Rule R35-2-2	11, 12, 14
Utah R. App. P. 24	1, 3, 12, 15
Utah R. App. P. 27	3
Utah R. Civ. P. 4	17, 24
Utah R. Civ. P. 7	5, 24
Utah R. Civ. P. 37	12, 19, 24

Utah R. Civ. P. 52	2, 15, 17
Utah R. Civ. P. 56	5, 23, 24

STATUTES

Utah Code §63-2-102	16
Utah Code §63-2-201	16
Utah Code §63-2-204	10, 14
Utah Code §63-2-205	10, 14
Utah Code §63-2-403	11, 14
Utah Code §63-2-404	11, 14, 15, 25
Utah Code §63-2-802	24

OTHER AUTHORITIES

Retention Reports labeled as Series 2266, 81804, 84406, 84410, 84416, 10546, 6314, 16944, 84409, 84381, 84411 & 24018, and Administrative Rule R35-1-4 & R35-2-2	9, 10, 11, 13, 20
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IN THE UTAH COURT OF APPEALS

NASRULLA KHAN,	:	
	:	APPELLANT'S REPLY BRIEF
Plaintiff/Appellant,	:	
	:	
vs.	:	
THE STATE RECORDS COMMITTEE,	:	Case No. 20070341
ET AL.,	:	
	:	
Defendants/Appellees.	:	

Appellant Khan files this Reply Brief.

DETAILS OF THE ARGUMENTS

**I. KHAN COMPLIED WITH UTAH R. APP. P. 24(k), AND
THIS COURT SHOULD NOT DISREGARD HIS BRIEF.**

Khan is not a lawyer, and he is appearing pro se in this case. He also prepared his Brief of the Appellant in accordance with the "Checklist for Briefs – Rules 24, 26, and 27" in this Court's Pro Se Guide -- Appeal Procedures. In *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the U.S. Supreme Court stated that it held a pro se complaint "to less stringent standards than formal pleadings drafted by lawyers." Hence, Khan's Brief may not be like the one a lawyer would draft.

In Appellees' Brief, they state: "Khan's brief lacks concision and organization. The brief fails to state whether or where Khan preserved his issues on appeal and it is bereft of a proper standard of review. The brief is little more than a collection of repetitive assertions that this Court should disregard" (pages 16-17). Khan disputes their statements.

Concerning the preservation of issues for appeal, in the Pro Se Guide, Checklist for Briefs, Content Requirements, it states: "5. Statement of the issues. For each issue state the standard of review and supporting authority;" pro se Khan complied with the requirements in the Pro Se Guide. Khan argues he had sufficiently preserved the issue about summary judgment for appeal in his memorandum opposing summary judgment, affidavit and exhibits (R. 320-420), and other pleadings, all of which were court records; the court made a ruling about summary judgment based on all those court records. He clearly stated in his Brief (pg. 8): "there was no hearing on the [summary judgment] motion;" hence, he could not present any objections or other issues to the court to preserve for appeal. Also, before the court issued its Order, he did not know what the Order would state, and he did not know which issues, if any, he would have to preserve for appeal. The Third District Court informed Khan that he had filed his motion for a new trial (R. 446-472) late; hence, he informed Appellees' Attorney Ferre on 4-10-07 that he was not serving that motion; he did not pursue that motion further. The foregoing are the exceptional circumstances for being unable to preserve for appeal two of his issues, i.e., abuses of discretion by the court, and the findings are clearly erroneous; hence, this Court should consider these two issues. (*State v. Brown*, 856 P.2d 358, 359 (Utah App. 1993)). Also, Utah R. Civ. P. 52(b) allows Khan to "thereafter" raise "the question of the sufficiency of the evidence to support the findings" whether or not he had "made in the district court an objection to such findings."

Khan stated the standard of review and supporting authority for each issue in his Brief (pages 1-2). See *Haines*, 404 U.S. at 520.

As required by *Oneida/SLIC, v. Oneida Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1052-53 (Utah App. 1994), to successfully appeal the court's findings of fact, Khan was required to marshal and "present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." Since he appealed the district court's numerous findings of fact and since there are about 523 pages of the record, for each finding, he marshaled and presented, in comprehensive and fastidious order, every scrap of competent evidence which supported that particular finding; then, he argued and showed that finding is "so lacking in support as to be against the clear weight of the evidence, thus making [it] clearly erroneous" (*Id.*). He also argued that the court committed abuses of discretion, and that it erred by granting summary judgment. Hence, Khan's Brief contains every scrap of numerous competent evidence, his arguments with evidence, and citations to the record; some of those may be repetitive, but he had to, and did, comply with the laws and Utah R. App. P. 24(a)(9).

For the foregoing reasons and for the circumstances of this appeal, his Brief does not lack concision and organization. See *Haines*, 404 U.S. at 520. Hence, Khan complied with Utah R. App. P. 24(k), and this Court should not disregard or strike his Brief. He complied with the GRAMA statutes and the court rules in this case. He argues that Appellees' Brief does not comply with the one-inch margin requirement on the top of each page of briefs (Utah R. App. P. 27(a)); hence, this Court should strike their Brief.

On page 17 of their Brief, Appellees mentioned Khan's federal cases in past years. Recently, in January 2007, Khan discovered evidence, DPS's Investigation Report, in which

DPS wrote: "... during the initial investigation [by Ogden Police] there didn't seem to be follow-up on the numbers and people that Mr. Khan had identified [as the alleged perpetrators concerning the continuing crimes against him]. This was unfortunate, because it may have saved Mr. Khan and county officials a lot of grief" (R. 370). This Investigation Report of DPS on Ogden Police confirms Khan's allegations that Ogden Police failed to investigate the evidence of the continuing crimes of phone harassment and stalking against him, that it concealed the evidence of those crimes, and that it obstructed justice. Khan argues this DPS Report is a very significant and important evidence, because Ogden City had repeatedly and deliberately written false statements regarding the 'failure-to-investigate' and other issues in its numerous signed pleadings to the federal courts in order to deceive those courts and to deliberately interfere with the administration of justice. Unfortunately, he did not have this Report and other such evidence at the time of his past federal cases. He had complied with the federal court rules, while Ogden City had not.

II. THE DISTRICT COURT INCORRECTLY GRANTED SUMMARY JUDGMENT TO APPELLEES, BECAUSE THEY DID NOT COMPLY WITH THE GRAMA, AND THE APPLICABLE GRAMA STATUTES AND ADMINISTRATIVE RULES IN RESPONDING TO KHAN'S FORMAL GRAMA REQUEST AND FORMAL GRAMA APPEALS, AND WITH DISCOVERY.

Summary judgment should not be granted unless the truth is clear (*Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962)). "If there is any doubt or uncertainty concerning questions of fact, the doubt should be resolved in favor of the opposing party. Thus, the court must evaluate all the evidence and all reasonable inferences fairly drawn from the evidence in a light most favorable to the party opposing summary judgment."

Frisbee v. K & K Constr. Co., 676 P.2d 387, 389 (Utah 1984). "In reviewing an order granting summary judgment we consider only the pleadings, depositions, admissions, answers to interrogatories, and affidavits properly before the trial judge." *Granite Credit Union v. Remick*, 133 P.3d 440, 443 note 4 (Utah App. 2006). "A single sworn statement is sufficient to create an issue of fact." *Webster v. Sill*, 675 P.2d 1170, 1172 (Utah 1983). "Facts asserted by the party opposing the [summary judgment] motion, if supported by affidavits or other evidentiary material, are regarded as true." Wright, Miller & Kane, Federal Practice & Procedure, Civil 3d §2727. "The evidence of the non-movant is to be believed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A. The district court incorrectly determined the Department complied with the GRAMA.

Khan disputes Appellees' statements in their Brief (pg. 19): "[DPS] did not violate GRAMA in responding to Khan's records request. The undisputed evidence established that the Department did not possess any records about a Department investigation of Khan or of Khan's November 2002 complaint." In accordance with Utah R. Civ. P. 56(c) and (e), and 7(c)(3)(B) and (D), Khan filed his opposing affidavit (R. 413-420) with his memorandum in opposition to respondents' motion for summary judgment (R. 320-336). In his sworn affidavit, Khan wrote that, from Appellees, he also received relevant "Investigation Reports of Mr. Keyser, Mr. McKee, and Mr. Miller" (R. 419, para. 42); in Appellees' response, they "dispute the alleged facts in paragraph 42" (R. 430, para. 29); (the two records, which the court ordered Appellees to produce to Khan after redaction, are the Investigation Reports of Mr. Keyser and Mr. McKee (see Khan's Brief, pg. 8), and not of Mr. Miller). In Khan's

statement of additional facts in dispute, he wrote: "Mr. Miller's Investigation Reports are incomplete" (R. 410, para. 21); DPS responded that the document speaks for itself, and it "dispute[s] Khan's characterization of this correspondence to the extent it differs from the actual correspondence" (R. 424-25, para. 14). Mr. Miller's Reports, dated 06/05/2003, do not contain the material, Case-related information about "Terroristic Threats" against Khan, "Possible Criminal Actions," and the "Letter" in the "Synopsis" and other sections (other than the Headings); the note, in the "Synopsis" section, was written on 8-23-06 while discovery in this case was ongoing (Addendum B, R. 221 & R. 222).

DPS refers to the Investigation Reports of Mr. Miller, Mr. Keyser and Mr. McKee as "correspondence" and "notes," instead of by the title "Investigation Report" which is on those reports (*Id.*, R. 369-372, & R. 373-374; R. 424-25, paras. 14 & 12). In their affidavits for Appellees, Mr. Wyss and Ms. Tuttle wrote they produced the "documents listed on the attached document index" (R. 304, para. 6; R. 313, para. 6); in their indexes, they themselves describe R. 221, R. 222, R. 373-374, and R. 369-372 as "Investigation Report[s]" (see R. 309, 310, 318 & 319, DPS/SRC 203, 221-222 & 223-226). Appellees wrote: "[The two documents [Investigation Reports] prepared by Agents Keyser and McKee] contain mental impressions of Agent Keyser [about Khan], the public revelation of which would chill an investigator's candidness and, again, the ability to [fully] investigate sensitive security complaints" (R. 190). At the hearing, their Attorney stated; "I think particularly the document dated November 22nd unnecessarily reveals the department's investigative procedures, . . ." (R. 513, pg. 6). Hence, these Reports are Investigation

Reports. In his affidavit, Khan wrote: "I did not request Mr. Keyser, Mr. McKee, and/or the Department to conduct a formal or informal investigation of me" (R. 414, para. 13); in DPS's response, it "disputes the allegations contained in paragraph 13" (R. 427, para. 10). In his complaints to DPS, he did not request DPS to conduct an investigation of him (Addendum B, R. 373); in his GRAMA request, he requested records "concerning my [November 8, 2002] complaints" to DPS, and not concerning investigation 'of him' (Addendum B, R. 299). DPS CAO wrote that Khan requested records of Mr. Keyser regarding his investigation "of [Khan]" (Addendum B, R. 11); DPS did not produce any evidence or cite any record to show that Khan requested Mr. Keyser or DPS to conduct an investigation of Khan. The Investigation Reports of Mr. Keyser and Mr. McKee show official and formal or informal investigations "of Khan" (R. 370 & R. 374; R. 329-330). The Investigation Reports of Mr. Miller and Mr. Keyser show official and formal or informal investigations of Khan's November 8, 2002 complaints of terrorism and crimes against him and the illegal actions of the Ogden City Police. (See Khan's Brief, pgs. 14-15, and 30). DPS assigned case numbers to those Reports; the investigations were formal. Khan stated that the affidavits of Mr. Wyss and Ms. Tuttle are misleading, inaccurate, and invalid (his Brief pgs. 16-18 and 39-41). Khan's competent evidence established that DPS possessed Investigation Reports about DPS's investigations of him and of his November 8, 2002 complaints.

Khan set forth specific facts, which DPS disputes, about: Mr. Miller's Investigation Reports being incomplete and untrue (Addendum B, R. 221 & R. 222); DPS possessing

Investigation Reports of Mr. Keyser, Mr. McKee, and Mr. Miller that it disputes (R. 424-25, paras. 12-14); these Investigation Reports indicating DPS's investigations of Khan and of his November 8, 2002 complaints; and these Reports being responsive to his GRAMA request.

These material facts show that there are genuine issues for trial.

Khan disputes DPS's statements in its Brief (pages 20-22):

Khan again failed to identify the requested information with any degree of specificity, let alone the 'reasonable specificity' required by the statute. . . . [N]o evidence was found to support your claims and no formal investigation was conducted . . . [DPS] does not have any records that satisfy your GRAMA request . . . [DPS's] interpretation of Khan's request is fair and reasonable. [DPS's] response that it had conducted no investigation and thus had no investigation records is likewise accurate and in compliance with GRAMA. . . . [DPS] does not now, nor has it ever, possessed records relevant to Khan's GRAMA request. . . . The undisputed, competent evidence supports the trial court's conclusion. [DPS] complied with GRAMA.

On August 29, 2005, Khan sent his written GRAMA request to DPS, in which he specifically stated: "I am requesting records concerning my complaints to the Utah Department of Public Safety and to the Utah Homeland Security Department. Following is the information concerning which I am requesting the records." Then, he specifically mentioned the particulars of his complaints, i.e., the date (November 8, 2002) and the subject matters ("terrorism and crimes against me" and "the illegal actions of the Ogden City Police") of his complaints. He specifically mentioned that he had corresponded with the named DPS officers and agents "about my [November 8, 2002] complaints." Khan also specifically mentioned that he had informed DPS about the failure of the Ogden Police to investigate his complaint of the 'recent' crimes against him that he had filed on April 17, 2003. Khan requested records pertaining to his November 8, 2002 complaints to DPS, and

also Mr. Keyser's records. (Addendum B, R. 299 & R. 373). In his affidavit (R. 414-415), he stated the facts about his GRAMA request and his November 8, 2002 complaints to DPS.

At the time he sent his GRAMA request, he did not have DPS's retention policies, and he did not know the descriptions of the internal paperwork, reports, information and records DPS had already generated pertaining to his November 8, 2002 complaints. It was reasonably impossible for him to describe all of those internal paperwork, reports, information and records that were already in DPS's possession with reasonable specificity in his GRAMA request. He described the requested records of correspondences between the named DPS officials and him, including the records of Mr. Keyser, that pertained to his November 8, 2002 complaints. In his GRAMA request, he requested records pertaining to his November 8, 2002 complaints to DPS. Those records would include the existing investigation reports of DPS pertaining to his November 8, 2002 complaints, the records and information pertaining to his complaints that DPS had already generated and retained pursuant to its retention policies, and the correspondences between the named DPS officials and him that had taken place pertaining to his complaints. Khan did not request Appellees to create records in response to his GRAMA request. Based on the circumstances, his GRAMA request provided all of the specific information with reasonable specificity.

In his affidavit, Khan wrote: "[After I sent my GRAMA request,] [DPS] failed to provide me the requested records or to issue a denial" (R. 415, para. 24); Appellees' response states: "Defendants dispute the alleged facts in paragraph 24. [DPS] denied

Khan's request" (R. 428, para. 17). DPS violated Utah Code §63-2-204(3)(a) and §63-2-205. Khan filed his GRAMA appeal to DPS's Chief Administrative Officer ("CAO"), stating "On August 29, 2005, I had sent my [GRAMA] Request to [DPS], and had requested records concerning my complaints to [DPS] . . . (copy enclosed)." He enclosed a copy of his GRAMA request (his Brief, pgs. 5-6). That enclosed GRAMA request provided all of the specific information with reasonable specificity, as stated above.

In his Brief (pgs. 30-31; also R. 16-17), Khan disputed the DPS CAO's response of October 3, 2005 to his GRAMA appeal; also, see above regarding his facts about Investigation Reports. DPS's "response that it had conducted no investigation and thus had no investigation records" is not accurate and not in compliance with GRAMA. In Khan's discovery request, he had requested records "that are relevant to one or more of the subject matters involved in this action" (R. 169-172). DPS, then, produced Investigation Reports (R. 369-372; R. 373-374; Addendum B, R. 221 & 222) and also some records (R. 262, 376-378, 387, 389; R. 148-149, DPS/SRC 1-13; R. 309-310, DPS/SRC 203-212, 214-226); all of these, produced by DPS during discovery, pertain to Khan's November 8, 2002 complaints, and are responsive to his GRAMA request; DPS has had all of them in its possession.

Pursuant to the identified DPS's retention policies, which it had produced to Khan (his Brief, pg. 7; Addendum C), it is required to retain the described records (R. 419, paras. 45, 46, & 48; R. 430, para. 32). Those responsive, retained records and information exist; DPS did not produce those records. DPS violated the GRAMA, the laws, and Khan's constitutional and legal rights. Its interpretation of Khan's GRAMA request is unfair and unreasonable.

Mr. Wyss produced copies of Mr. Miller's Investigation Reports (R. 304, para. 6; R. 309, DPS/SRC 203; Addendum B, R. 221 & 222), see above; the copies of those Investigation Reports are incomplete and untrue. Khan stated that the affidavit of Mr. Wyss is misleading, inaccurate, and invalid (his Brief pgs. 16-18 and 39-41).

In its Order, the district court did not mention the following material facts: (1) Mr. Miller's incomplete and untrue Investigation Reports; (2) the retention policies of DPS; and (3) the official correspondences between the named DPS officials and Khan. DPS did not comply with the GRAMA, with the applicable laws, and violated Khan's constitutional and legal rights. Khan's competent and undisputed evidence does not support the district court's conclusion; his affidavit and the affidavit of Mr. Wyss are directly opposed as to the material facts.

Khan set forth specific, material facts showing that there are genuine issues for trial. Therefore, this Court should not affirm the grant of summary judgment to the Department.

B. The district court incorrectly determined the Records Committee complied with the GRAMA and the Administrative Rules.

Khan disputes Appellees' statements in their Brief (pgs. 22-24). The CAO of DPS wrote: "You have the right to appeal this denial to the State Records Committee pursuant to Utah Code. Ann. §63-2-403, or to the district court pursuant to §63-2-404." (Addendum B, R. 11). On November 1, 2005, Khan filed a notice of appeal to the State Records Committee pursuant to §63-2-403, appealing the denial of his GRAMA appeal by the CAO. (R. 15-18). According to Administrative Rule R35-2-2(b), the chair of the Committee, and not the Executive Secretary, determines "that sufficient facts have or have not been alleged."

Appellees and their attorney have failed to cite the record where "Khan attempts to assail the Records Committee's determination and trial court's conclusion with bald assertions and conjectural statements" and "[Khan] opts instead to assert the Committee had no sound reason to deny him a hearing" (their Brief, pg. 23); they also failed to identify the alleged "bald assertions and conjectural statements." They have failed to comply with Utah R. App. P. 24(b) and 24(a)(9), and this Court should strike these statements or their Brief; he disputes their statements. Khan is unable to sufficiently respond to these statements of theirs. His facts are: **(1)** the Records Committee's order of November 7, 2005 stated: "Sufficient facts have not been alleged to determine that the records do exist" (R. 8); on that date, the Administrative Rule R35-2-2(b) stated the petitioner should provide "sufficient evidence . . . that [the] record did exist at one time" (Addendum C, R. 9). Ms. Tuttle and the Committee deleted three words of that Rule, and changed the tense of one word. **(2)** In his affidavit, Khan wrote that, from Appellees, "I received a few relevant, public records after I had [served] the request for production of documents and [filed] the Rule 37 motion. Those relevant records are Investigation Reports of Mr. Keyser, Mr. McKee, and Mr. Miller, one correspondence of mine with Mr. Flowers, and other relevant records" (R. 419, para. 42). In Appellees' response, they "dispute the alleged facts in paragraph 42" (R. 430, para. 29). In her affidavit, Ms. Tuttle of the Records Committee produced DPS's Investigation Reports and some records "pertaining to Mr. Khan" after making a search of the records of "the State Records Committee" (see R. 313, paras. 5 & 6; R. 315-319; Khan's Brief, pgs. 30-31). **(3)** In Khan's Notice of Appeal to the Committee, he provided sufficient evidence in support of

his GRAMA appeal that the records did exist at one time (R. 15-17); this fact is supported by Ms. Tuttle's affidavit (see the previous fact (2)), and by R. 304-310 and R. 313-319. He gave the Committee copies of his GRAMA request and the DPS CAO's determination. (4) Pursuant to the Committee's Administrative Rules and retention policies, which it had produced to Khan (his Brief, pg. 7; Addendum C), it is required to retain records (R. 419, paras. 45, 47, & 48; R. 430, para. 32). The identified Rules and retention policies describe the records to be retained; the Committee did not produce those records.

As stated above for DPS, the Committee produced Investigation Reports and also the identified records; all of these, produced by the Committee during discovery, pertain to Khan's November 8, 2002 complaints, and are responsive to his GRAMA request; the Committee has had all of them in its possession.

In its Order, the district court did not mention the following material facts: (1) Mr. Miller's incomplete and untrue Investigation Reports; (2) the Administrative Rules and retention policies of the Records Committee; and (3) the official correspondences between the named DPS officials and Khan. The Committee and Ms. Tuttle did not comply with the GRAMA, with the applicable laws and the Administrative Rules, and violated Khan's constitutional and legal rights. Khan's sound, competent and undisputed evidence does not support the district court's conclusion; his affidavit and the affidavit of Ms. Tuttle are directly opposed as to the material facts.

Khan set forth specific, material facts showing that there are genuine issues for trial. Therefore, this Court should not affirm the grant of summary judgment to the Records Committee.

The district court's findings misrepresented or misquoted the Committee's order and Rule R35-2-2(b); the court included those findings in its "Undisputed Material Facts," and Khan stated that those were clearly erroneous. (Addendum A, R. 442; Khan's Brief, pgs. 28-29). The court granted summary judgment to the Committee based on those findings, also. The errors are not harmless.

Utah Code §63-2-204(7) states: "If the governmental entity fails to provide the requested records or issue a denial within the specified time period, that failure is considered the equivalent of a determination denying access to the record." §63-2-205(2)(c) and (d) state "that the requester has the right to appeal the denial" to the CAO of the governmental entity, and specifies the time limits for filing an appeal. Since §63-2-204(7) applied to this case, Khan filed an appeal to the CAO of DPS (R. 301). After the CAO denied his appeal, Khan filed a notice of appeal with the Executive Secretary of the Records Committee, pursuant to §63-2-403. After the Committee issued its order, he filed his petition for judicial review by the district court of the State Records Committee's order, pursuant to §63-2-404(1) and to the statement in that order. One of the court's "undisputed material facts" states that Khan "petitioned this Court for judicial review of the [DPS] Commissioner's response" (Addendum A, R. 442); Khan showed that this finding is clearly erroneous (his Brief, pgs. 27-28). The court's findings and Order are not based on the judicial review of the Records

Committee's order; the court's grant of summary judgment and Order are based on "the department's [i.e., DPS's] response to [Khan's GRAMA] request" (Addendum A, R. 443). The district court's failure to perform judicial review of the Records Committee's order clearly violates §63-2-404 and the GRAMA. There is a doubt as to whether the court "made its decision de novo." (§63-2-404(7)(a)). All of these serious errors and violations are not harmless errors. If the court had not made these serious errors or legal mistakes, there is a sufficiently high likelihood that, based on the material facts Khan has set forth in his Briefs, Appellees' motion for summary judgment would have been denied. *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 796 (Utah 1991).

C. The district court's order did not comply with Utah R. Civ. P. 52(a).

Khan disputes Appellees' statements in their Brief (pgs. 25-26). Appellees wrote: "Khan also contends the trial court erred by failing to enter specific findings of fact on all material issues." (Their Brief, pg. 25). Appellees and their attorney have failed to cite the record where Khan contended this, and Khan is unable to sufficiently respond to this statement of theirs. They have failed to comply with Utah R. App. P. 24(b) and 24(a)(9), and this Court should strike this statement or their Brief. Utah R. Civ. P. 52(a) states: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon" In this case, there was no jury and no advisory jury. "Regardless of what the rule in terms requires, whenever the decision of a matter requires the court to resolve conflicting versions of the facts, findings are desirable and ought to be made" (Wright & Miller, Federal Practice & Procedure, Civil 3d §2575).

The court did not find the facts specially and state separately its conclusions of law on Khan's allegations of the violations of his constitutional "right of access to information concerning the conduct of the public's business" (Utah Code §63-2-102(1)(a)), and his legal rights of access to unrestricted public records (Utah Code §63-2-102(3)(a) and §63-2-201(1)). In enacting the GRAMA, the Utah Legislature recognized the constitutional right (§63-2-102(1)(a)); Utah's GRAMA is based on that constitutional right and the legal rights.

Khan disputes Appellees' arguments about violations of his constitutional right (their Brief, pg. 26, note 5). The Utah constitutional right (§63-2-102(1)(a)), the legal rights, and Utah's GRAMA are the bases for Khan's GRAMA request; he did not cite any "federal constitutional right to access particular documents or information under governmental control;" he did not cite a general first amendment right. Khan did not request particular records (his Brief, pg. 46); his GRAMA request is for records and information pertaining to his November 8, 2002 complaints. He did not request "immediate access to everything government officials do or that records contain" if the records and/or information were not relevant to one or more of the subject matters involved in this action.

Appellees cited *Bailey v. Bayles*, 2002 UT 58 (their Brief, pg. 26, note 5) in which the constitutional issue was not an issue in that case itself; that issue arose in connection with the action of the Court of Appeals. In this case, the GRAMA is based on the Utah constitutional right (§63-2-102(1)(a)), too; that right is inherent to the GRAMA. Khan presented competent evidence which shows that, before he filed the Petition and in their responses to his GRAMA request and GRAMA appeals (Addendum B, R. 11; R. 8),

Appellees did not provide him a single, existing and responsive record or a single, existing Investigation Report pertaining to his November 8, 2002 complaints. Appellees produced some existing and responsive records and Investigation Reports, pertaining to his November 8, 2002 complaints, after he served the discovery request and filed the motion to compel. The court did not comply with Rule 52(a) by not finding the facts specially and stating separately its conclusions of law on Khan's valid claims of violations of his constitutional right and legal rights, and of Appellees' noncompliance with the GRAMA and the applicable laws in their responses to his GRAMA request and GRAMA appeals, i.e., before he filed the Petition.

The court did not find the facts specially and state separately its conclusions of law on awarding Khan the full and reasonable costs incurred by him in effecting the formal service upon Appellees, pursuant to Utah R. Civ. P. 4(f)(4) (R. 237-240), and on Khan's requests for relief (R. 42).

Khan set forth specific, material facts showing that there are genuine issues for trial.

Therefore, this Court should not affirm the grant of summary judgment.

III. KHAN DID NOT RECEIVE ALL OF THE RECORDS IN APPELLEES' POSSESSION THAT PERTAIN TO HIS NOVEMBER 8, 2002 COMPLAINTS, AND THAT ARE RESPONSIVE TO HIS GRAMA REQUEST; THUS, HIS APPEAL IS NOT MOOT.

Khan disputes Appellees' statements in their Brief (pgs. 26-28). His GRAMA request is for records pertaining to his November 8, 2002 complaints of crimes and terrorism against him and the illegal actions of the Ogden Police. (Addendum B, R.299 & R. 373).

In Ms. Tuttle's affidavit, she wrote: "5. . . . I made a reasonably diligent search of the records of the State Records Committee in an effort to determine the existence and whereabouts of records pertaining to Mr. Khan . . . 7. That the Records Committee, based upon its searches and belief, has no other records, nor am I aware of any other records in the Records Committee's possession pertaining to Khan." (R. 313 & 314). In Mr. Wyss's affidavit, he wrote: "7. I made a diligent search of the records of [DPS], and contacted various [DPS] employees in an effort to determine the existence and whereabouts of documents pertaining to Mr. Khan and I did not find any records beyond those listed on the attached index. . . . 10. So far as I am aware, those non-privileged records [DPS] could locate that did or may have pertained to Mr. Khan have been made available to Mr. Khan." (R. 304 & 305). Khan argues that their affidavits give "no detail as to the scope of the [search] and thus is insufficient as a matter of law to establish its completeness." *Weisberg v. U.S. Dep't. of Justice*, 627 F.2d 365, 370 (C.A.D.C. 1980). He argues their affidavits "do not provide information specific enough to enable [Khan] to challenge the procedures utilized. Under these circumstances, issues genuinely existed as to the thoroughness of [their] search, and consequently summary judgment was improper." (*Id.* at 371). (*Weisberg* is analogous to this GRAMA case of Khan.)

In his affidavit, Khan wrote: "[After I filed the motion for an order compelling discovery,] [Appellees] produced a few more public records that are relevant to [my] GRAMA request" (R. 418, para. 41). In Appellees' response, they "dispute the alleged facts of paragraph 41. [Appellees] provided Khan some additional documents they located after

responding to Khan's original request for production of documents and supplemented their response . . . these documents are not responsive to Khan's original GRAMA request." (R. 429-30, para. 28). There is only one GRAMA request dated August 29, 2005, addressed to DPS (Addendum B, R. 299). Appellees also produced Investigation Reports (R. 369-372; R. 373-374; Addendum B, R. 221 & 222) and some of the records (R. 262, 376-378, 387, 389; R. 148-149, DPS/SRC 1-13; R. 309-310, DPS/SRC 203-212, 214-226) in response to his request for production of documents and to his motion to compel. These produced, public records "are relevant to one or more of the subject matters involved in this action" (R. 169-172); these records, produced by Appellees during discovery, pertain to Khan's November 8, 2002 complaints, and are responsive to his GRAMA request. In his affidavit, Khan wrote that, from Appellees, "I received a few relevant, public records after I had [served] the request for production of documents and [filed] the Rule 37 motion. Those relevant records are Investigation Reports of Mr. Keyser, Mr. McKee, and Mr. Miller, one correspondence of mine with Mr. Flowers, and other relevant records" (R. 419, para. 42). In Appellees' response, they "dispute the alleged facts in paragraph 42" (R. 430, para. 29).

As Khan stated above, Mr. Miller's Investigation Reports are incomplete; Appellees did not produce the existing, true and complete copies of Mr. Miller's two official Investigation Reports, including the synopses, the letter, the information, and the cover sheet (Addendum B, R. 221 & 222) that pertain to Khan's November 8, 2002 complaints (see Khan's Brief, pg. 14-15). (Appellees had written that they "did not provide [Khan] two privileged documents . . . of Agents Keyser and McKee" (R. 188); later, the court ordered them to give Khan the

redacted copies of those two privileged documents (Investigation Reports) of Agents Keyser and McKee (R. 369-372, & R. 373-374). (Khan's Brief, pg. 8)). In the district court, Appellees did not argue that Mr. Miller's Reports were privileged. Since Appellees themselves introduced Mr. Miller's two Investigation Reports into this case by producing parts of these Reports to Khan, Khan argues they are required to produce the true and complete copies of these two existing Reports, including the synopses, the letter, the information, and the cover sheet. They did not produce Mr. Keith's official communications (R. 380). They did not produce the privileged records (R. 305, para. 10; R. 313, para. 6). In its Order, the court did not dispute that Appellees failed to produce the complete and true copies of Mr. Miller's two, existing, official Investigation Reports, Mr. Keith's official communications, and the privileged records. These official records exist, and Appellees did not produce them. Based on Khan's undisputed evidence, his appeal is not moot.

Pursuant to Appellees' retention policies and Administrative Rules, which they themselves had produced to Khan (his Brief, pg. 7; Addendum C), they are required to retain the described records. The identified, retention policies and Rules describe the records to be retained. In its Order, the court did not dispute that: (1) Appellees' retention policies and Administrative Rules exist; and (2) they failed to produce all of those identified, retained records. Hence, those identified, responsive, retained records and information exist; Appellees have failed to produce those, and they have violated the GRAMA, the applicable laws, Rules, and Khan's constitutional and legal rights. Therefore, based on Khan's competent evidence, his appeal is not moot.

Appellees produced copies of only five official correspondences between DPS officials and Khan (R. 376, 377 & 378; R. 148, DPS/SRC 1 & 2) pertaining to his November 8, 2002 complaints. They "do not dispute that Khan addressed letters and electronic mail to employees of [DPS] and the Utah Division of Homeland Security in 2002 and 2003" regarding his November 8, 2002, complaints (R. 414, para. 4; R. 426, para. 4; R. 409, paras. 1 & 2; R. 422, paras. 1 & 2); they admit Mr. Keith of DPS "communicated with an Ogden Police official regarding [Khan's] complaint to DPS" (R. 411, para. 22; R. 380; R. 424, para. 14). But they did not produce all of those official correspondences that pertain to his November 8, 2002 complaints, and that are responsive to his GRAMA request. They wrote: "Messrs. Miller and Keith no longer work for [DPS] and [DPS] no longer has copies of or cannot locate any correspondence between Khan and these individuals that may exist other than those produced in discovery" (R. 430, para. 30). Khan argues that he had corresponded with them and the other named DPS officials, while they had been working for DPS, about the terrorism, the crimes, and the illegal actions of Police (R. 414-415, paras. 4-8, 10, 11, 15, and 16; Addendum B, R. 299). It is not reasonable to believe that DPS's official correspondences on such crimes are not in DPS or the Records Committee; a jury could reasonably infer the existence of these material, official correspondences. In its Order, the court did not mention, and did not dispute, the above-mentioned official correspondences between the named DPS officials and Khan; the court did not dispute that Appellees failed to produce all of those responsive, material and official correspondences. Hence, the responsive, material, official correspondences exist, and Appellees have failed to produce

them. Therefore, based on Khan's competent evidence, his appeal is not moot.

Khan disputed some of the statements of Mr. Wyss and Ms. Tuttle in their affidavits (see Khan's Brief, pgs. 16-18). He had corresponded with Governor Mike Leavitt, Mr. Miller, Mr. McKee and Mr. Keyser concerning his November 8, 2002 complaints (*Id.*, pg. 4; his affidavit R. 414, paras. 4-8, 10-12; R. 419, para. 42). Mr. Miller's "Investigation Reports" are investigation reports of Khan's complaints of "Terroristic Threats" and crimes against him, and those Reports also state "Possible Criminal Actions." (Addendum B, R. 221 & 222). The reports of Mr. Keyser and Mr. McKee pertain to Khan's November 8, 2002 complaints, and are titled "Investigation Reports" (R. 369-372 & 373-374); also see above in this Reply Brief. Hence, DPS conducted investigations of his complaints.

In *Haines*, 404 U.S. at 520, the U.S. Supreme Court ruled: "Allegations such as those asserted by [pro se] petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence." That Court also stated: "we hold [a pro se complaint] to less stringent standards than formal pleadings drafted by lawyers." (*Id.*). Pro se Appellant Khan has produced competent and reliable evidence, above, in his pleadings and in his Brief to support his claim Appellees did not produce to him all of the material records and information in their possession that pertain to his November 8, 2002 complaints, and that are responsive to his GRAMA request. He has clearly identified, above, some of the existing, responsive and official records and information they have not produced to him during discovery; he does not possess some of those records and information. Appellees have violated the GRAMA, the applicable laws, and Khan's constitutional and legal rights.

The district court did not mention or dispute some of Khan's material facts and evidence, as stated above.

Appellees did not produce the affidavits of the named DPS officials, Messrs. Behunin, Groll, Flowers, White, Keith, Miller, Keyser and McKee (even if some of them no longer work for DPS) who had personal knowledge of Khan's November 8, 2002 complaints, of the correspondences, and of the responsive records DPS had created and retained; the existence or nonexistence of the material records should be determined from the testimonies under oath of these named DPS officials. Appellees produced the affidavits only of Mr. Wyss and Ms. Tuttle who have no personal knowledge of the matters in issue pertaining to Khan's November 8, 2002 complaints, and who searched for the records. Hence, genuine issues of material facts exist as to whether all of the records sought by Khan's GRAMA request has been produced, precluding summary judgment (*Weisberg v. U.S. Dep't. of Justice*, 543 F.2d 308 (C.A.D.C. 1976)). Therefore, there are justiciable issues before this Court, and Khan's appeal is not moot.

Khan disputes Appellees' statements in their Brief (note 6, pgs. 27-28).

(1) On January 9, 2007, Khan filed his objections to the proposed order (R. 255-262). The court failed to serve its order on him (Addendum A, R. 263-265). Khan did not know of the court's decision on his objections to the proposed order and of its signed order until after he received the court's certified index of records (after May 24, 2007), which he received after he filed the notice of appeal. Also, on September 1, 2006, Khan filed his motion for a stay (Utah R. Civ. P. 56(f)) on Appellees' motion for partial summary judgment (R. 127-130); on

that date, discovery was ongoing. Since the court did not give its decision on his motion for a stay, discovery has not been closed and it is incomplete. Discovery was not closed and complete on September 18, 2006 (R. 74-75), because Appellees produced the Investigation Reports and some responsive records (R. 309-310, DPS/SRC 203-226) after that date and into January 2007. In his memorandum in opposition to summary judgment motion, he stated that during discovery, DPS and the Records Committee had not produced all of the records that pertained to his November 8, 2002 complaints (R. 326 & R. 333); he has identified, above, some of the records they have not produced. Hence, discovery is incomplete (his Brief, pgs. 23-24). Therefore, the court's consideration of the second summary judgment motion was untimely and unsound. Appellees' statement that the court's Order was "a final judgment of dismissal" (their Brief, pg. 1) is incorrect.

(2) Khan filed his motion for imposition of costs pursuant to Utah R. Civ. P. 4(f)(4). (R. 237-240, 247-249). That Rule requires the court to "impose upon [Appellees] the costs subsequently incurred in effecting service." Pursuant to Rule 37(a)(4)(A), the court should order Appellees to pay Khan the reasonable expenses incurred in obtaining the order (R. 257). The court should also award Khan "litigation costs reasonably incurred in connection with a judicial appeal of a denial of a records request if the requester substantially prevails." §63-2-802(2)(a).

(3) Khan has presented his arguments in his Brief (pgs. 11-12) about the court's statements. He argues that Utah R. Civ. P. 56 and 7 allow him to file his memorandum in opposition to the summary judgment motion, and the court is required to base its decision on his

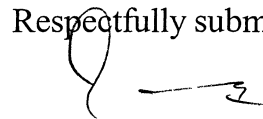
memorandum, too, and not just on Appellees' motion. The court used Appellees' wordings from their pleadings for its findings. In his Brief, he stated that the court's findings of fact are clearly erroneous, that the court abused its discretion, and that it erred by granting summary judgment motion. Hence, based on Khan's arguments, the court's statements in the court about his case are prejudicial or biased.

Khan set forth specific, material facts showing that there are genuine issues for trial. Therefore, this Court should not affirm the grant of summary judgment.

CONCLUSION

Based upon the foregoing and the arguments presented in his Opening Brief, Khan has presented competent evidence, which shows Appellees have not produced the identified records and information that pertain to his November 8, 2002 complaints, and that are responsive to his GRAMA request. Appellees did not comply with the GRAMA and the applicable laws and Administrative Rules before Khan filed the Petition, and then, later, during valid discovery; they violated his constitutional right. Thus, they are not entitled to summary judgment. The court's Order clearly violates Utah Code §63-2-404 and the GRAMA. Khan requests this Court to not affirm the grant of summary judgment.

Respectfully submitted on February 12, 2008



Nasrulla Khan

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing **Appellant's Reply Brief** were served on Ms. Bridget Romano, Assistant Attorney General, Utah Attorney General's Office, 160 East 300 South, 6th Floor, P.O. Box 140856, Salt Lake City, UT 84114-0856, by first class mail, postage prepaid, or personal service, on February 12, 2008.

A handwritten signature in black ink, appearing to read 'Nasrulla Khan', with a horizontal line underneath it.

Nasrulla Khan

ADDENDA

Addendum A See the Addendum in the "Brief of the Appellant."

Addendum B See the Addendum in the "Brief of the Appellant."

Addendum C See the Addendum in the "Brief of the Appellant."

Addendum D Utah Code §63-2-802.

Utah R. App. P. 24; Utah R. App. P. 27.

Utah R. Civ. P. 7; Utah R. Civ. P. 37.

ADDENDUM "D"
STATUTE & RULES

U.C.A. 1953 § 63-2-802

West's Utah Code Annotated Currentness

Title 63. State Affairs in General

Chapter 2. Government Records Access and Management Act (Refs & Annos)

Part 8. Remedies

→§ 63-2-802. Injunction--Attorneys' fees

(1) A district court in this state may enjoin any governmental entity or political subdivision that violates or proposes to violate the provisions of this chapter.

(2)(a) A district court may assess against any governmental entity or political subdivision reasonable attorneys' fees and other litigation costs reasonably incurred in connection with a judicial appeal of a denial of a records request if the requester substantially prevails.

(b) In determining whether to award attorneys' fees under this section, the court shall consider:

(i) the public benefit derived from the case;

(ii) the nature of the requester's interest in the records; and

(iii) whether the governmental entity's or political subdivision's actions had a reasonable basis.

(c) Attorneys' fees shall not ordinarily be awarded if the purpose of the litigation is primarily to benefit the requester's financial or commercial interest.

(3) Neither attorneys' fees nor costs shall be awarded for fees or costs incurred during administrative proceedings.

(4) Notwithstanding Subsection (2), a court may only award fees and costs incurred in connection with appeals to district courts under Subsection 63-2- 404(2) if the fees and costs were incurred 20 or more days after the requester provided to the governmental entity or political subdivision a statement of position that adequately explains the basis for the requester's position.

(5) Claims for attorneys' fees as provided in this section or for damages are subject to Title 63, Chapter 30d, Governmental Immunity Act of Utah.

Rule 24. Briefs.

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references. (a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Advisory Committee Note. Rule 24 (a)(9) now reflects what Utah appellate courts have long held. See *In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" *ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1052-53 (Utah App. 1994) (alteration in original)(quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)). See also *State ex rel. M.S. v. Salata*, 806 P.2d 1216, 1218 (Utah App. 1991); *Bell v. Elder*, 782 P.2d 545, 547 (Utah App. 1989); *State v. Moore*, 802 P.2d 732, 738-39 (Utah App. 1990).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.

Rule 27. Form of briefs.

(a) Paper size; printing margins. Briefs shall be typewritten, printed or prepared by photocopying or other duplicating or copying process that will produce clear, black and permanent copies equally legible to printing, on opaque, unglazed paper 8 1/2 inches wide and 11 inches long, and shall be securely bound along the left margin. Paper may be recycled paper, with or without deinking. The printing must be double spaced, except for matter customarily single spaced and indented. Margins shall be at least one inch on the top, bottom and sides of each page. Page numbers may appear in the margins.

(b) Typeface. Either a proportionally spaced or monospaced typeface in a plain, roman style may be used. A proportionally spaced typeface must be 13-point or larger for both text and footnotes. Examples are CG Times, Times New Roman, New Century, Bookman and Garamond. A monospaced typeface may not contain more than ten characters per inch for both text and footnotes. Examples are Pica and Courier.

(c) Binding. Briefs shall be printed on both sides of the page, and bound with a compact-type binding so as not unduly to increase the thickness of the brief along the bound side. Coiled plastic and spiral-type bindings are not acceptable.

(d) Color of cover; contents of cover. The cover of the opening brief of appellant shall be blue; that of appellee, red; that of intervenor, guardian ad litem, or amicus curiae, green; that of any reply brief, or in cases involving a cross-appeal, the appellant's second brief, gray; that of any petition for rehearing, tan; that of any response to a petition for rehearing, white; that of a petition for certiorari, white; that of a response to a petition for certiorari, orange; and that of a reply to the response to a petition for certiorari, yellow. All brief covers shall be of heavy cover stock. There shall be adequate contrast between the printing and the color of the cover. The cover of all briefs shall set forth in the caption the full title given to the case in the court or agency from which the appeal was taken, as modified pursuant to Rule 3(g), as well as the designation of the parties both as they appeared in the lower court or agency and as they appear in the appeal. In addition, the covers shall contain: the name of the appellate court; the number of the case in the appellate court opposite the case title; the title of the document (e.g., Brief of Appellant); the nature of the proceeding in the appellate court (e.g., Appeal, Petition for Review); the name of the court and judge, agency or board below; and the names and addresses of counsel for the respective parties designated as attorney for appellant, petitioner, appellee, or respondent, as the case may be. The names of counsel for the party filing the document shall appear in the lower right and opposing counsel in the lower left of the cover. In criminal cases, the cover of the defendant's brief shall also indicate whether the defendant is presently incarcerated in connection with the case on appeal and if the brief is an *Anders* brief.

(e) Effect of non-compliance with rules. The clerk shall examine all briefs before filing. If they are not prepared in accordance with these rules, they will not be filed but shall be returned to be properly prepared. The clerk shall retain one copy of the non-complying brief and the party shall file a brief prepared in compliance with these rules within 5 days. The party whose brief has been rejected under this provision shall immediately notify the opposing party in writing of the lodging. The clerk may grant additional time for bringing a brief into compliance only under extraordinary circumstances. This rule is not intended to permit significant substantive changes in briefs.

Advisory Committee Note - The change from the term "pica size" to "ten characters per inch" is intended to accommodate the widespread use of word processors. The definition of pica is print of approximately ten characters per inch. The amendment is not intended to prohibit proportionally spaced printing.

An *Anders* brief is a brief filed pursuant to *Anders v. California*, 386 U.S. 793, 97 S.Ct. 1396 (1967), in cases where counsel believes no nonfrivolous appellate issues exist. In order for an *Anders*-type brief to be accepted by either the Utah Court of Appeals or the Utah Supreme Court, counsel must comply with specific requirements that are more rigorous than those set forth in *Anders*. See, e.g. *State v. Wells*, 2000 UT App 304, 13 P.3d 1056 (per curiam); *In re D.C.*, 963 P.2d 761 (Utah App. 1998); *State v. Flores*, 855 P.2d 258 (Utah App. 1993) (per curiam); *Dunn v. Cook*, 791 P.2d 873 (Utah 1990); and *State v. Clayton*, 639 P.2d 168 (Utah 1981).

Rule 7. Pleadings allowed; motions, memoranda, hearings, orders, objection to commissioner's order.

(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim; an answer to a cross claim, if the answer contains a cross claim; a third party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

(b) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial or in proceedings before a court commissioner, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(c) Memoranda.

(c)(1) Memoranda required, exceptions, filing times. All motions, except uncontested or ex parte motions, shall be accompanied by a supporting memorandum. Within ten days after service of the motion and supporting memorandum, a party opposing the motion shall file a memorandum in opposition. Within five days after service of the memorandum in opposition, the moving party may file a reply memorandum, which shall be limited to rebuttal of matters raised in the memorandum in opposition. No other memoranda will be considered without leave of court. A party may attach a proposed order to its initial memorandum.

(c)(2) Length. Initial memoranda shall not exceed 10 pages of argument without leave of the court. Reply memoranda shall not exceed 5 pages of argument without leave of the court. The court may permit a party to file an over-length memorandum upon ex parte application and a showing of good cause.

(c)(3) Content.

(c)(3)(A) A memorandum supporting a motion for summary judgment shall contain a statement of material facts as to which the moving party contends no genuine issue exists. Each fact shall be separately stated and numbered and supported by citation to relevant materials, such as affidavits or discovery materials. Each fact set forth in the moving party's memorandum is deemed admitted for the purpose of summary judgment unless controverted by the responding party.

(c)(3)(B) A memorandum opposing a motion for summary judgment shall contain a verbatim restatement of each of the moving party's facts that is controverted, and may contain a separate statement of additional facts in dispute. For each of the moving party's facts that is controverted, the opposing party shall provide an explanation of the grounds for any dispute, supported by citation to relevant materials, such as affidavits or discovery materials. For any additional facts set forth in the opposing memorandum, each fact shall be separately stated and numbered and supported by citation to supporting materials, such as affidavits or discovery materials.

(c)(3)(C) A memorandum with more than 10 pages of argument shall contain a table of contents and a table of authorities with page references.

(c)(3)(D) A party may attach as exhibits to a memorandum relevant portions of documents cited in the memorandum, such as affidavits or discovery materials.

(d) Request to submit for decision. When briefing is complete, either party may file a "Request to Submit for Decision." The request to submit for decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. If no party files a request, the motion will not be submitted for decision.

(e) Hearings. The court may hold a hearing on any motion. A party may request a hearing in the motion, in a memorandum or in the request to submit for decision. A request for hearing shall be separately identified in the caption of the document containing the request. The court shall grant a request for a hearing on a motion under Rule 56 or a motion that would dispose of the action or any claim or defense in the action unless the court finds that the motion or opposition to the motion is frivolous or the issue has been authoritatively decided.

(f) Orders.

(f)(1) An order includes every direction of the court, including a minute order entered in writing, not included in a judgment. An order for the payment of money may be enforced in the same manner as if it were a judgment. Except as otherwise provided by these rules, any order made without notice to the adverse party may be vacated or modified by the judge who made it with or without notice. Orders shall state whether they are entered upon trial, stipulation, motion or the court's initiative.

(f)(2) Unless the court approves the proposed order submitted with an initial memorandum, or unless otherwise directed by the court, the prevailing party shall, within fifteen days after the court's decision, serve upon the other parties a proposed order in conformity with the court's decision. Objections to the proposed order shall be filed within five days after service. The party preparing the order shall file the proposed order upon being served with an objection or upon expiration of the time to object.

(f)(3) Unless otherwise directed by the court, all orders shall be prepared as separate documents and shall not incorporate any matter by reference.

(g) Objection to court commissioner's recommendation. A recommendation of a court commissioner is the order of the court until modified by the court. A party may object to the recommendation by filing an objection in the same manner as filing a

motion within ten days after the recommendation is made in open court or, if the court commissioner takes the matter under advisement, ten days after the minute entry of the recommendation is served. A party may respond to the objection in the same manner as responding to a motion.

Rule 37. Failure to make or cooperate in discovery; sanctions.

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(a)(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(a)(2) Motion.

(a)(2)(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(a)(2)(B) If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(a)(3) Evasive or incomplete disclosure, answer, or response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(a)(4) Expenses and sanctions.

(a)(4)(A) If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(a)(4)(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after opportunity for hearing, require the moving party or the attorney or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(a)(4)(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(b)(1) Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(b)(2) Sanctions by court in which action is pending. If a party fails to obey an order entered under Rule 16(b) or if a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Subdivision (a) of this rule or Rule 35, , unless the court finds that the failure was substantially justified, the court in which the action is pending may take such action in regard to the failure as are just, including the following:

(b)(2)(A) deem the matter or any other designated facts to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b)(2)(B) prohibit the disobedient party from supporting or opposing designated claims or defenses or from introducing designated matters in evidence;

(b)(2)(C) strike pleadings or parts thereof, stay further proceedings until the order is obeyed, dismiss the action or proceeding or any part thereof, or render judgment by default against the disobedient party;

(b)(2)(D) order the party or the attorney to pay the reasonable expenses, including attorney fees, caused by the failure;

(b)(2)(E) treat the failure to obey an order, other than an order to submit to a physical or mental examination, as contempt of court; and

(b)(2)(F) instruct the jury regarding an adverse inference.

(c) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or

the truth of the matter, the party requesting the admissions may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court on motion may take any action authorized by Subdivision (b)(2).

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Failure to participate in the framing of a discovery plan. If a party or attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court on motion may take any action authorized by Subdivision (b)(2).

(f) Failure to disclose. If a party fails to disclose a witness, document or other material as required by Rule 26(a) or Rule 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), that party shall not be permitted to use the witness, document or other material at any hearing unless the failure to disclose is harmless or the party shows good cause for the failure to disclose. In addition to or in lieu of this sanction, the court on motion may take any action authorized by Subdivision (b)(2).

(g) Failure to preserve evidence. Nothing in this rule limits the inherent power of the court to take any action authorized by Subdivision (b)(2) if a party destroys, conceals, alters, tampers with or fails to preserve a document, tangible item, electronic data or other evidence in violation of a duty. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.